January 10, 2000

D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-P

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies.

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I. INTRODUCTION

This is an arbitration proceeding being held by the Department of Telecommunications and Energy ("Department"), subject to the Telecommunications Act of 1996[(1)] ("the Act"), between Bell Atlantic-Massachusetts ("Bell Atlantic") and AT&T Communications of New England, Inc. ("AT&T"), MCI WorldCom, Inc. ("MCI WorldCom"), and Sprint Communications Corporation. Two additional parties, Z-Tel Communications, Inc. ("Z-Tel") and Fairpoint Communications Corporation ("Fairpoint"), have been permitted to intervene for the limited purposes of participating in this portion of the arbitration proceeding.

The issue before the Department at this stage of the arbitration proceeding is the extent to which Bell Atlantic should be required, and under what terms, to provide combinations of unbundled network elements ("UNEs") to competitive local exchange carriers ("CLECs") pursuant to the Act. This question has been addressed to one extent or another by a number of regulatory bodies and courts over the last several years, including the United States Supreme Court,[(2)] the Federal Communications Commission ("FCC"),[(3)] and this Department, and we will not herein provide a narrative of all of those orders.

The two most recent Department orders on this topic were the Phase 4-J Order issued on March 19, 1999 ("Phase 4-J Order"), and the Phase 4-K Order issued on May 21, 1999 ("Phase 4-K Order").[(4)] In the Phase 4-J Order, the Department ruled that because Bell Atlantic had committed to the FCC to continue to provide individual UNEs that had been included in FCC Rule 319,[(5)] even though that rule had been vacated by the Supreme Court,[(6)] Bell Atlantic was obligated also to comply with FCC Rule 315(b) regarding the provision of existing assembled UNEs.[(7)] Phase 4-J Order at 9. In short, existing combined UNEs would be required to be provided in their combined form to CLECs. Id. at 9-10. In the Phase 4-J Order, however, the Department did not reach the issue of combination of UNEs that did not already exist in combined form in the Bell Atlantic network.

In the Phase 4-K Order, the Department accepted certain Bell Atlantic proposals, found that it would not mandate a recombination requirement on Bell Atlantic for previously uncombined UNEs, but directed Bell Atlantic to develop "an additional, alternative or supplemental method for provisioning previously uncombined UNEs in such a way that they can be recombined by competing carriers without imposing a facilities requirement on those carriers." Phase 4-K Order at 26-27.

On June 10, 1999, AT&T filed with the Department a Motion for Partial Reconsideration ("Motion") of the Phase 4-K Order. In its Motion, AT&T requests that the Department reconsider that Order because the Department (1) mistakenly concluded that Bell Atlantic is under no obligation to combine UNEs that are not currently combined in its network, and (2) declined to rule whether the Department has the power to impose such an obligation under Massachusetts law and declined to order Bell Atlantic to do so (Motion at 1). AT&T suggested that the Department postpone consideration of this Motion until all parties had the opportunity to evaluate the revised UNE combinations proposal to be

submitted by Bell Atlantic pursuant to the Phase 4-K Order. On October 27, 1999, the Department asked parties to address AT&T's Motion.

On June 18, 1999, Bell Atlantic filed its Compliance Submission on Unbundled Network Element Provisioning ("Compliance Submission") in response to the Phase 4-K Order. On October 20, 1999, the Department issued a procedural notice asking for comments on the Compliance Submission. On October 27, 1999, the Department expanded on its October 20, 1999, request for comments to invite parties to address the distinction between previously-combined UNEs and UNEs that were not previously combined. Parties were asked to address the following question related to the scope of Bell Atlantic's obligation, pursuant to the Phase 4-J Order, to provide already-combined UNEs in a combined form to CLECs:

Should the definition of "UNEs that were previously combined" be limited to discrete physical elements on a customer-specific basis or should the definition be viewed more generically as UNEs that were previously combined by Bell Atlantic for the offering of any retail product to any retail customer?

The Department requested that parties combine their comments on these issues and submit one set of comments addressing their current position on the provisioning of UNEs and UNE combinations. In light of the passage of time since the Phase 4-K Order, the Department noted that it would be helpful to receive updates from the parties, in order to address this issue comprehensively. The Department also asked the parties to include comments on the effect of the FCC's recent order defining the UNEs that incumbents like Bell Atlantic must provide to competitors.[(8)] Bell Atlantic filed its initial comments on December 1, 1999. Comments were received from AT&T, MCI WorldCom, Z-Tel, and Fairpoint on December 15, 1999. Reply comments were filed by Bell Atlantic on December 22, 1999, and a reply letter was submitted by AT&T on December 23, 1999.

II. BELL ATLANTIC PROPOSALS

A. Loop and Local Switching Combinations

In its initial comments, Bell Atlantic indicates that it has reassessed its position concerning new loop and local switching UNE platform ("UNE-P") combinations. Bell Atlantic states that it will voluntarily provide that combination even where the loop and local switching elements comprising the UNE-P do not already exist in combined form for a specific customer in its network. Bell Atlantic states that it will offer this

combination throughout Massachusetts under the same terms as for existing loop and local switching combinations, subject to limitations discussed below. Bell Atlantic states that this offer addresses the principal type of combination that CLEC parties in this case have sought and satisfies fully any Department concerns about a differentiation between existing and new UNE-P arrangements. Bell Atlantic states, however, that it reserves the right to review this voluntary commitment based on judicial action by the Eighth Circuit Court of Appeals concerning FCC Rules 51.315(c)-(f) (Bell Atlantic Comments at 13). Bell Atlantic further asserts that no further Department action is required at this stage of the proceeding, in light of its offer (id. at 20).

Z-Tel offers "cautious support" for Bell Atlantic's proposal, although it expresses concern about particular details of the UNE-P service offering. Accordingly, it asks that a detailed tariff offering be submitted by Bell Atlantic to fully describe the service (Z-Tel Comments at 4-6). Bell Atlantic, in reply, indicates that it will file such a tariff no later than January 15, 2000 (Bell Atlantic Reply Comments at 3).

AT&T states that the Department should issue an order memorializing Bell Atlantic's commitment to provide UNE-P. AT&T cites what it refers to as Bell Atlantic's "sorry track record" on UNE-P in Massachusetts and expresses suspicion that Bell Atlantic's offer is meant to "neutralize this issue" while the Department is considering Bell Atlantic's Section 271 application. Accordingly, it argues that Bell Atlantic's attempt to reserve the right to change its offer is not acceptable. AT&T asserts that CLECs cannot make viable business plans if they cannot be sure that Bell Atlantic will honor and live up to its obligation to provide access to UNE-P (AT&T Comments at 14-19). MCI WorldCom argues that the Department should order Bell Atlantic to provide UNE combinations pending the outcome of the Eighth Circuit's ruling on FCC Rules 51.315(c)-(f) (MCI WorldCom Comments at 13).

Bell Atlantic responds by asserting that AT&T has misrepresented its position, which is to provide new combinations pending the outcome of the Eighth Circuit's ruling on FCC Rules 51.315(c)-(f). This, notes Bell Atlantic, is precisely what was requested by MCI WorldCom and is appropriate given the current stage of legal proceedings surrounding the FCC rules. Bell Atlantic says that no Department order is necessary in this proceeding, but that, in any case, the most the Department should do is issue the directive suggested by MCI WorldCom (Bell Atlantic Reply Comments at 4-5).

AT&T responds that, under the Act, the Department does not have the option of simply not deciding issues raised by the parties to an interconnection agreement arbitration. AT&T notes that its interconnection agreement with Bell Atlantic contains a provision under which Bell Atlantic had refused to provide UNE-P unless otherwise ordered to do so by the Department or as result of decision of the United States Supreme Court. AT&T also reiterates its concern about Bell Atlantic's potential for restricting access to UNE-P in the future (AT&T Reply Letter at 1-2). MCI WorldCom makes similar points (MCI WorldCom Comments at 13).

On the tariff issue, the parties have agreed that the terms and conditions surrounding the UNE-P service offer should be documented in the form of detailed tariff provisions. It is appropriate to have such a tariff, as noted by Z-Tel, so that all parties will understand the costs and obligations surrounding this service offering. Accordingly, Bell Atlantic is directed to file a tariff in which this service offering is made available and in which the terms and conditions of service are clearly stated, and including all applicable charges. We accept Bell Atlantic's proposal to do so by January 15, 2000. Bell Atlantic also is directed to file copies of this proposed tariff with all of the participants in docket D.T.E. 99-271.

We agree with AT&T and MCI WorldCom that it is unacceptable for Bell Atlantic to offer this service and to have the unilateral right to withdraw it without review by the Department. The uncertainty created by such a provision would undermine its value in supporting the development of conditions for a competitive local exchange market in Massachusetts. As AT&T correctly notes, CLECs will make business, marketing, and investment decisions based on the availability of UNE-P. If Bell Atlantic were to have the unilateral right to withdraw the service, it could substantially impair those investment and business choices. However, insofar as Bell Atlantic is bound both by a tariff and the dispute resolution and arbitration provisions of its interconnection agreements with the CLECs, it cannot act unilaterally in this regard. Accordingly, the Department's order to include the UNE-P service offering in the tariff offers the protection requested by the CLECs. In recognition that this is an arbitration proceeding, however, in which this very issue has been in dispute for many months, we also accept AT&T's argument that it is appropriate to memorialize Bell Atlantic's offer by directing it to provide UNE-P under the terms and conditions it has voluntarily set forth in its December 1, 1999, filing.[(9)]

B. UNE Remand Order

In response to the Supreme Court's January 25, 1999 decision, the FCC issued its UNE Remand Order that affects the provision of UNEs to CLECs. Bell Atlantic's December 1, 1999, filing contains its proposals with regard to implementing the UNE Remand Order.

First, Bell Atlantic notes that it is no longer obligated, under that order, to provide unbundled local switching, alone or in combination with loops, to CLECs for use in providing service to customers with four or more lines in Density Zone 1 central offices. Thus, according to Bell Atlantic, such switching is no longer considered a UNE under Section 251(c)(3) of the Act. However, the provision of such switching is still required under Section 271 of the Act, if a Bell Operating company is to offer interLATA service. Bell Atlantic summarizes the FCC discussion as stating that the primary difference that now remains is one of pricing: such switching can now be priced at market levels rather than at TELRIC levels (Bell Atlantic Comments at 7-8).

On this matter, Bell Atlantic reports that it is considering the pricing of local switching with the Density Zone 1 central offices, and, if it determines it will change its rates from the current TELRIC rates, it will attempt to negotiate such changes with the CLECs.

Until new rates become effective, Bell Atlantic will continue to offer the switching component of existing UNE-P arrangements at the approved UNE-P rates (id. at 6-8).

Second, Bell Atlantic notes that the UNE Remand Order affects the existing UNE-P offering as related to the Operator Services/Directory Assistance ("OS/DA") component of the offering. In short, OS/DA need not be offered as a UNE. OS/DA must, however, be offered on a nondiscriminatory basis to CLECs, although the price for the services need not be based on TELRIC levels. As above, Bell Atlantic states that it reserves the right to modify the rates of the OS/DA capabilities and will attempt to negotiate those rates with CLECs. Until the new rates become effective, Bell Atlantic will continue offering the OS/DA component of existing UNE-P arrangements at the approved TELRIC rates (id. at 9-10).

Third, Bell Atlantic reports that the FCC ruled that an incumbent local exchange carrier ("ILEC") was required to provide access to shared transport only when providing access to unbundled switching. In light of the FCC determination that switching is not a network element that must be unbundled in Density Zone 1 central offices for four lines or more, Bell Atlantic argues that it is not required to provide shared transport in association with such switching. Bell Atlantic states, though, that it will stand by its merger-related commitment to the FCC to provide shared transport as a bundled element until August 14, 2001. Prior to the expiration of the merger obligation, Bell Atlantic will attempt to negotiate any changes in the existing shared transport arrangement with CLECs (id. at 10-11).

Finally, Bell Atlantic notes that the UNE Remand Order has implications for Enhanced Extended Links ("EELs") in two respects. First, if an ILEC wishes to avail itself of the Density Zone 1 local switching exclusion, it must offer EEL. Bell Atlantic asserts that its EEL service offering not only conforms in great measure to the order but goes beyond the FCC requirements. Bell Atlantic states, however, that it will modify its proposal to conform completely with the UNE Remand Order (id. at 13-16).

AT&T does not disagree with most of Bell Atlantic's interpretations of the requirements of the UNE Remand Order. Instead, it makes three requests. First, AT&T states that Bell Atlantic's commitments should be made permanent in a Department order. Second, it states that particular aspects of the EEL-related proposals should be resolved in Docket D.T.E. 98-57, wherein the Department has ordered Bell Atlantic to file its revised EEL tariff. Third, while AT&T agrees that any pricing changes in services no longer considered UNEs should be addressed in negotiations with the CLECs, it states that any changes in the Bell Atlantic's UNE-P, EELS, and switch sub-platform combinations should be included in Bell Atlantic's non-recurring cost compliance filing (AT&T Comments at 23-24). MCI WorldCom also raises a number of issues concerning the EEL service offering (MCI WorldCom Comments at 14-20).

As noted by the parties, the Department is currently considering all aspects of the switch sub-platform and the EEL service offerings in D.T.E. 98-57. We need not reach conclusions concerning these services in this arbitration proceeding. The other docket

will provide a complete record that will be used by the Department to establish the appropriate terms and conditions of service. We have addressed review of a UNE-P service offering above.

On the other aspects of its filing, the Department finds that Bell Atlantic's proposals are consistent with the terms of the UNE Remand Order and directs that they be adopted as proposed by Bell Atlantic in the parties' interconnection agreements.

III. MOTION FOR RECONSIDERATION

In light of Bell Atlantic's December 1, 1999, filing, and the conclusions reached in this order, AT&T's Motion for Reconsideration is made moot, and it is denied without prejudice.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That Bell Atlantic is required to provide UNE-P under the Terms and Conditions proposed by Bell Atlantic on December 1, 1999; and it is

FURTHER ORDERED: That Bell Atlantic file a revision to M.D.T.E. No. 17 including all terms, conditions, and applicable charges by January 15, 2000; and it is

FURTHER ORDERED: That the Motion for Reconsideration of AT&T is denied as moot; and it is

FURTHER ORDERED: That Bell Atlantic comply with all other directives contained herein.

By Order of the Department,

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

1. 47 U.S.C. § 252.

2. AT&T Corp. et al. v. Iowa Utilities Board et al., 525 U.S. 366 (1999).

3. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. August 8, 1996).

4. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.

5. 47 C.F.R. § 51.319.

6. AT&T Corp. et al. v. Iowa Utilities Board et al., 525 U.S. 366 (1999).

7. Rule 315(b) states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b).

8. In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. November 5, 1999) ("UNE Remand Order").

9. Fairpoint's comments dealt exclusively with certain conditions Bell Atlantic had proposed on new UNE-P arrangements in its June 18, 1999, compliance filing following the Phase 4-K Order (Fairpoint Comments at 5-10). In light of Bell Atlantic's December 1, 1999, commitment to withdraw those conditions, Fairpoint's comments are moot and we need not address them.